

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of Dale & Selby Superette,
WIC Vendor No. W6904

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha at 9:00 a.m. on October 20, 1998, at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota. The record closed on December 4, 1998, upon receipt of the Department's reply brief.

Wendy Willson Legge, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Minnesota Department of Health (Department). Mark D. Luther, Attorney at Law, 8800 Highway Seven, Suite 408, Firststar Bank Building, Minneapolis, Minnesota 55426, appeared on behalf of the Appellant, Dale & Selby Superette ("Dale & Selby").

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of the Department of Health shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Anne Barry, Commissioner, Department of Health, 450 Metro Square Building, 121 7th Place E., St. Paul, Minnesota 55101.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether Dale & Selby Superette violated Minn. Rule 4617.0086 and, if so, whether it should be disqualified as a vendor in the special supplemental food program for women, infants & children ("WIC") for a period of three years.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Dale & Selby Superette is a grocery store located at 618 Selby Avenue, St. Paul, Minnesota 55102. The store is owned by Bassam Hasan. Hayat Elmanasra is a part-time manager of the store. Ms. Elmanasra is Mr. Hasan's sister-in-law.

2. Issa Ayesh is an employee of Dale & Selby. His duties include operating the cash register as a cashier and stocking shelves.

3. Dale & Selby became an authorized WIC vendor on February 4, 1992.^[1] As part of the authorization process, a contract was executed between the Department and the vendor, which allows the grocery store to sell food items to WIC participants in exchange for WIC vouchers. The vouchers are limited to certain types and brands of food items. They cannot be exchanged for cash or non-food products.^[2] The Department issues to the vendor a vendor stamp with a unique vendor number. On February 4, 1992, the Department issued Dale & Selby a vendor stamp with Vendor No. 6904.^[3] After a vendor accepts a WIC voucher from a WIC participant, the vendor must stamp the voucher with the vendor's stamp. The vendor then must deposit the voucher in the vendor's bank. All vouchers are cleared through 1st State Bank of Lake Lillian. The vouchers are then returned to the Department.^[4]

4. In the course of the Department's monitoring of vendors, the Department sent Dale & Selby Superette a warning letter dated April 18, 1996, as a "reminder of certain WIC program vendor requirements."^[5] This letter was not in response to a finding by the Department that violations were being submitted, rather the Department had received a report that violations were being committed.^[6]

5. The most recent vendor agreement for Dale & Selby covers the time period of May 1, 1998, to April 30, 1999. It was signed by the Department and Bassam Hasan on April 6, 1998. The agreement details the requirements for participation in the WIC program. The agreement provides, in part, as follows:

The vendor shall not provide, in exchange for voucher, any store credit, cash, non-food items or food items other than the WIC allowed foods specified on the voucher.

The vendor shall charge the WIC program only for items received by a WIC customer. The vendor shall not charge the WIC program for more WIC allowed food than is specified on the WIC customer's voucher. The vendor shall not collect sales tax on WIC food purchases.^[7]

6. On June 7, June 11, and July 9, 1998, an undercover investigator for the Department posed as a WIC customer at the Dale & Selby Superette. These undercover investigations are referred to by the Department as "compliance buys" and are supervised by Freddie Marsh-Lott, Compliance Manager for the Department whose duties are to ensure that vendors authorized under the WIC program comply with the program rules, and to also ensure that vendors not authorized by the program do not participate in the program.^[8]

7. On June 7, 1998, the undercover investigator, posing as "Renee Adams," entered the Dale & Selby Superette at 618 Selby Avenue in St. Paul. The investigator obtained, in exchange for the voucher, one gallon of milk, two cans of Juicy Juice, one

dozen eggs and two 13.5 oz. boxes of Razzle Dazzle Rice Crispies.^[9] The agent presented Voucher No. 47025159 in exchange for these items.^[10]

8. Issa Ayesh was operating the cash register during the compliance buy on June 7, 1998. He recorded the amount of \$29.91 on the voucher.^[11] He took \$29.91 in cash from the register and placed it in his pocket.^[12]

9. The voucher bearing Dale & Selby Superette Vendor Stamp, W6904, was deposited for the account of Dale & Selby Superette at 1st State Bank of Lake Lillian.^[13] The voucher was redeemed in the amount of \$29.91.^[14]

10. The total value of the food items obtained was \$17.64.^[15] This total was based upon Dale & Selby's posted prices and price reports kept by the Department.^[16]

11. The voucher states that the items that could be obtained were 36 oz. (or less) of WIC-approved cereal, one gallon containers of fortified fluid milk, one pound WIC-approved domestic cheese, 18 oz. of peanut butter, two cans of 46 oz. 100% fruit juice (or) four cans of 6 oz. 100% frozen fruit juice.^[17] Razzle Dazzle Rice Crispies is not a WIC-approved cereal.^[18] All other items obtained are WIC-approved.^[19]

12. On June 11, 1998, the investigator, again posing as Renee Adams, entered the Dale & Selby Superette. She obtained two cans of Juicy Juice, one dozen eggs, one gallon of milk, two 13.5 oz. boxes of Razzle Dazzle Rice Crispies, and one pack (box) Marlboro Light cigarettes.^[20] The investigator exchanged Voucher No. 47025222 for these items.^[21]

13. Issa Ayesh was operating the cash register during the compliance buy on June 11, 1998. He recorded the amount of \$29.91 on the voucher.^[22] He took \$29.91 in cash from the register and placed it in his pocket.^[23]

14. The voucher bearing Dale & Selby Superette's vendor stamp, W6904, was deposited for the account of Dale & Selby Superette at 1st State Bank of Lake Lillian.^[24] The voucher was redeemed in the amount of \$29.91.^[25]

15. The total value of the food items obtained was \$17.64.^[26] This total was based upon Dale & Selby Superette's posted prices and price reports kept by the Department.^[27]

16. The voucher states that the items that could be obtained were 36 oz. (or less) of WIC-approved cereal, one gallon containers of fortified fluid milk, one lb. WIC-approved domestic cheese, one dozen eggs, 18 oz. of peanut butter, two cans of 46 oz. 100% fruit juice (or) four cans of 6 oz. 100% frozen fruit juice.^[28] Razzle Dazzle Rice Crispies is not a WIC-approved cereal.^[29] Cigarettes are not a food item, and are not listed on the voucher as an item that could be obtained.^[30] With the exception of the Razzle Dazzle Rice Crispies and the cigarettes, all other items were WIC-approved foods.

17. On July 9, 1998, the investigator again posing as "Renee Adams" entered Dale & Selby Superette. The investigator obtained one gallon of milk, one dozen eggs, two 46 oz. cans of pineapple juice, one pack (box) Marlboro Lights cigarettes, two 16.1 oz. boxes of Cocoa Frosted Flakes.^[31] The investigator exchanged Voucher No. 47025162 for these items.^[32]

18. Issa Ayesh was operating the cash register during the compliance buy on July 9, 1998. He recorded the amount of \$29.91 on the voucher.^[33] He took \$29.91 in cash from the register and placed it in his pocket.^[34]

19. The voucher bearing Dale & Selby Superette's vendor stamp, W6904, was deposited for the account of Dale & Selby Superette at 1st State Bank of Lake Lillian.^[35] The voucher was redeemed in the amount of \$29.91.^[36]

20. The total value of the food items obtained was \$17.64.^[37] This total was based upon Dale & Selby Superette's posted prices and price reports kept by the Department.^[38]

21. The voucher states that the items that could be obtained were 36 oz. (or less) of WIC-approved cereal, one gallon containers of fortified fluid milk, one lb. WIC-approved domestic cheese, one dozen eggs, 18 oz. of peanut butter, two cans of 46 oz. 100% fruit juice (or) four cans of 6 oz. 100% frozen fruit juice.^[39] Cocoa Frosted Flakes is not a WIC-approved cereal.^[40] Cigarettes are not a food item and are not listed on the voucher as an item that could be obtained.^[41] With the exception of the Cocoa Frosted Flakes and cigarettes, all other items were WIC-approved foods.

22. The Department sent a letter dated September 4, 1998, and addressed to Bassam Hasan on behalf of Dale & Selby Superette. The letter informed Mr. Hasan of the alleged violations and provided him notice that the store was disqualified as an authorized WIC vendor as of September 19, 1998, for a period of three years.^[42] The letter contained notification of violations of Minn. R. 4617.0086, subp. 2(B)(Class B violations) and Minn. R. 4617.0086, subp. 2(C)(Class C violations), but these violations were not considered in the disqualification.^[43] The letter was received September 5, 1998.^[44]

23. The disqualification letter was the first contact between the Department and the Dale & Selby Superette regarding the compliance buys.^[45] No notice of lesser violations (Class B and Class C) was sent to the vendor after the compliance buys until the September 4, 1998 disqualification letter.

24. About September 6, 1998, Mr. Ayesh's theft was discovered by Dale & Selby Superette through Ms. Elmanasra.^[46] Mr. Ayesh is presently employed at Dale & Selby Superette in an effort to repay the amount stolen.^[47]

25. A Notice of and Order for Hearing in this matter was issued by the Commissioner of Health on September 16, 1998. The notice set the matter for hearing on October 9, 1998, before Administrative Law Judge Phyllis A. Reha.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Minnesota Department of Health have jurisdiction in this matter pursuant to Minn. Stat. § 14.40, 7 C.F.R. § 246.18, and Minn. R. 461.0100, subp. 1.

2. The Notice of Hearing was proper in all respects and the Department has complied with all other substantive and procedural requirements of law or rule.

3. Minn. R. 4617.0086, subp. 3 provides in relevant part:

Itemization of Class A violations....

- A. charging the WIC program for items not received by a WIC customer;
- B. providing one or more nonfood items in exchange for a voucher, regardless of whether food items are also provided;

* * *

L. charging the WIC program more money for an item than the vendor's usual and customary charge for that item;

4. The Department has the burden of proving by a preponderance of the evidence that Dale & Selby Superette violated its guarantee and WIC Program rules and that such violations support disqualification of Dale & Selby Superette from participating in the WIC Program for three years.

5. Dale & Selby Superette violated its vendor agreement and the Minnesota Rules either by charging the WIC program for foods not received by an undercover investigator or by charging the WIC program more than the store's usual and customary charge for the foods received by the undercover investigator and by providing nonfood items in exchange for a WIC voucher. These violations are Class A violations under Minn. R. 4617.0086, subp. 3.

6. Minn. R. 4617.0086, subp. 2A, provides for disqualification for one year for a vendor's first Class A violation. That rule item also states that "For each additional Class A violation committed by the vendor, the commissioner shall disqualify the vendor for the maximum period authorized in Code of Federal Regulations, title 7, section 246.12 (k)(1)(ii), as amended."

7. Code of Federal Regulations, title 7, section 246.12 (k)(1)(ii), states:
(ii) The period of disqualification from Program participation shall be a reasonable period of time, not to exceed three years. The maximum period of disqualification shall be imposed only for serious or repeated Program abuse.

8. The Class A violations committed by Dale & Selby Superette constitute "serious and repeated Program abuse" that support the maximum period of disqualification.

9. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of Health AFFIRM the disqualification of Dale & Selby Superette from the WIC Program for three years.

Dated this 23rd day of December 1998.

PHYLLIS A. REHA
Administrative Law Judge

Reported: Michelle K. Pecharich
Kirby A. Kennedy & Associates
One Volume.

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NOTICE

Under Minnesota law, ^[48] the Commissioner of Health is required to serve her final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

Dale & Selby Superette does not contest the violations alleged by the Department. However, Dale & Selby Superette argues that the fact that the violations occurred because of employee theft shields Dale & Selby Superette from sanctions. Dale & Selby Superette further argues that the lack of a warning letter after the compliance buy renders the disqualification arbitrary and capricious. Finally, Dale & Selby Superette asserts that were a three year sanction to be imposed, such sanction would be unreasonable in light of the facts of this case.

I. Employee Misconduct

Dale & Selby Superette concedes that Mr. Ayesh was an employee at the time that he committed these unauthorized acts. The vendor agreement specifically states that prohibited acts constitute violations if committed by “any controlling person, employee, or agent of the vendor...”^[49] Additionally, the paragraph above the signature line on the vendor agreement states: “The individual signing this agreement on behalf of the Vendor certifies that he...understands that the Vendor is fully accountable for the actions of its controlling persons, employees, and agents relative to this agreement.”^[50] Minnesota WIC rules do not allow for an exception based upon employee misconduct. More importantly, Minnesota WIC Rules make clear that an act of the employee is an act of the vendor.

Contrary to the suggestion of the Appellant, the fact that the Federal Food Stamp Program does allow for such an exception is inapposite. Dale & Selby Superette was authorized under, operated under, was investigated under and was disqualified under the WIC Program alone. Therefore, the WIC Program provides the rules upon which this decision must be based.

II. Notice of Violations

Dale & Selby Superette asserts that the failure to give notice of the observed Class B and Class C violations prior to disqualification constitutes arbitrary and capricious conduct.^[51] The Class B and Class C violations were not used to determine the period of disqualification in this matter. The recently adopted rules governing the different classes of violations distinguish between Class A violations, which do not require notice and an opportunity to correct, and Class B and Class C violations, which do have those requirements. The former rules did not require notice be given prior to disqualification. The Court of Appeals has held that notice and an opportunity to correct was not required of the Department under the former rules.^[52] Only Department policy (as set out in its Statement of Need and Reasonableness or "SONAR") provided for notice and an opportunity to correct. The Court of Appeals analyzed the notice requirement as follows:

On the facts of this case, however, we decline to apply the SONAR to reverse the disqualification for the following reasons: (1) the federal rules do not require the notice referred to in the SONAR; (2) the agency rule does not require the notice; (3) the guarantee that Whitney's Market signed specifically states that any violation will result in disqualification; (4) the guarantee is consistent with the rules providing different penalties for a first and second offense; (5) Whitney's did not demonstrate that it relied on the SONAR; and (6) the nature of the violations demonstrate that Whitney's knew that it was violating WIC rules by providing unauthorized food because the vouchers were manipulated to reflect the cost of the WIC-approved foods rather than the cost of nonapproved food that the customer received.^[53]

The first five factors are identical in this matter to those applied in *Whitney's*. Dale & Selby Superette asserts that the lack of knowledge by a vendor of an employee's action constitutes a defense to disqualification. This assertion falls generally within the sixth factor in *Whitney's*. In support of this argument, Dale & Selby Superette cites *R. Ranch Market Corp. v. U.S.*, 861 F.2d 236 (9th Cir. 1988), which holds that an employer lacking actual or constructive knowledge of the improper activity cannot be permanently disqualified for violations of the food stamp program rules.

The holding in *R. Ranch Market Corp.* was revisited in *Kim v. U.S.*, 121 F.3d 1269, 1273 (9th Cir. 1997), which held that:

The first issue presented by this appeal is whether a store owner may be permanently disqualified from the Food Stamp Program when, unknown to him, one of his employees trafficked in food stamps. This is not the first time we have encountered this question. In *R Ranch Market Corp. v. United States*, 861 F.2d 236 (9th Cir. 1988), we held that under then-existing law, the FCS was required to demonstrate the owner's actual or constructive knowledge of the employee's trafficking before permanently disqualifying the owner from participating in the Food Stamp Program. In *R Ranch*, we struck down a regulation that permitted disqualification without requiring proof that the employees acted on behalf of the ownership or management, writing that "[t]he sanction of permanent disqualification is a draconian penalty, and we are reluctant to infer that Congress intended to impose such a sanction on an unknowing employer absent a clear indication that such was Congress' intent." *Id.* at 239.

* * *

[2] The 1988 amendments to the Act and their accompanying legislative history unmistakably evidence Congress's intent to impose permanent disqualification as a penalty for trafficking even where the store owner had no knowledge of and did not benefit from the trafficking. **That Congress amended the Act in 1988 to provide for sanctions less severe than permanent disqualification for innocent store owners who have in place an effective policy to prevent trafficking violations leads ineluctably to the conclusion that innocent store owners whose stores lack such a policy remain subject to permanent disqualification.** Every court that has addressed the issue has so held. See *Bakal Bros., Inc. v. United States*, 105 F.3d 1085, 1088 (6th Cir. 1997) (["7 U.S.C. S 2021(b)(3)(B)] clearly permits FCS to impose a sanction--either permanent disqualification or a civil money penalty--on an 'innocent' store owner for trafficking by employees."); *TRM, Inc. v. United States*, 52 F.3d 941, 945 (11th Cir. 1995) ("We conclude that Congress would not have provided a [civil money penalty] as an alternative to permanent disqualification for innocent owners had it not felt that innocent owners could be disqualified under the Food Stamp Act."); *Freedman v. United States Dep't of Agriculture*, 926 F.2d 252, 259 (3^d Cir. 1991) ("The fact that the civil money penalty was to be imposed only if it is determined that a store owner had an effective policy to prevent violations clearly

indicates that Congress intended 'innocent' store owners to be subject to the penalties authorized by section 2021(b) of the Food Stamp Act as amended in 1988."). See also *Corder v. United States*, 107 F.3d 595, 597 (8th Cir. 1997) ("The legislative history [of the 1988 amendments] clarified that innocent store owners are liable, while recognizing the need for a less harsh[than permanent disqualification] monetary sanction in some cases[.]").

In light of the 1988 amendments to the Act, which post-dated R Ranch, R Ranch is no longer viable as to actions commenced under the 1988 amendments. Accordingly, we must join our unanimous sister circuits in holding that 7 U.S.C. § 2021(b) allows the FCS to disqualify even innocent owners permanently from participation in the Food Stamp Program for trafficking violations. Accordingly, Kim's argument that the FCS may not penalize him as an innocent store owner fails. This is a harsh and perhaps unfair result, but one commanded by the 1988 amendments and the accompanying regulations. [Emphasis added].

III. Reasonableness of Sanctions

The holding in *Kim* is clear that there is no "innocent store owner exception" to sanctions under the Food Stamp program. Permanent disqualification under the Food Stamp program is the penalty for such store owners who lack employee controls to prevent misconduct. Dale & Selby Superette lacks those very controls needed to prevent employee misconduct. The Department has pointed out that other WIC Program disqualifications have not exempted store owners from employee errors.^[54] Disqualification is the appropriate penalty in this matter.

Due to the repeated Class A violations of Dale & Selby Superette, disqualification of the vendor for a period of three years is reasonable and is supported by the record in the matter and the applicable portions of the WIC Program rules. Therefore, the Administrative Law Judge recommends that the disqualification issued by the Department in this matter be AFFIRMED.

P.A.R.

^[1] Tr., at 125-26; Ex. 1.

^[2] Tr., at 121.

^[3] See Ex. 1.

^[4] Tr., at 121, 124.

^[5] Ex. 26.

^[6] Ex. 26 at ¶ 4.

^[7] Ex. 4, at 3.

^[8] Tr. at 20, 56-8; Exs. 7, 11, and 16.

^[9] Ex. 7.

^[10] Exs. 7 and 8.

- [11] Tr., at 141.
- [12] Tr., at 142.
- [13] Exs. 8 and 5.
- [14] *Id.*
- [15] Ex. 10.
- [16] Ex. 10; Tr., at 78-79, 81-82.
- [17] Ex. 8.
- [18] Ex. 3 at 41.
- [19] Ex. 3 at 41.
- [20] Exs. 11 and 13.
- [21] Ex. 12.
- [22] Tr., at 143.
- [23] Tr., at 143-44.
- [24] Exs. 12 and 5.
- [25] Exs. 12 and 5.
- [26] Ex. 15.
- [27] Ex. 15; Tr., at 78-79, 81-82.
- [28] Ex. 12.
- [29] Ex. 3 at 41.
- [30] Ex. 3 and 12.
- [31] Exs. 16 and 18.
- [32] Ex. 17.
- [33] Tr., at 144.
- [34] Tr., at 144.
- [35] Exs. 17 and 5.
- [36] Exs. 17 and 5.
- [37] Ex. 20.
- [38] Ex. 20; Tr., at 78-79, 81-82.
- [39] Ex. 17.
- [40] Ex. 3, at 41.
- [41] Ex. 3; Ex. 17.
- [42] Ex. 24.
- [43] Ex. 24.
- [44] Ex. 24.
- [45] Tr., at 154.
- [46] Tr., at 160-61.
- [47] Tr., at 156.
- [48] Minnesota Statutes, section 14.62, subdivision 1.
- [49] Ex. 4 at ¶ XI; Ex. 3 at 21; Minn. Rule 4617.0086, subp. 3 (1997).
- [50] Ex. 4 at ¶ XIV.
- [51] Dale & Selby Superette Brief, at 5.
- [52] ***In re the Matter of Whitney's Market***, 1998 WL 15911 (Minn. App. Jan. 20, 1998), *rev. denied* March 19, 1998.
- [53] ***In re the Matter of Whitney's Market***, 1998 WL 15911, at 3.
- [54] Department Brief, at 11 (*citing In the Matter of Chicago Avenue Food & Deli* (Commissioner's Order issued October 5, 1998)(inadvertent processing of improperly received WIC voucher supported one year disqualification)).